

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

February 6, 2014 at 9:30 a.m.

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1. [13-25332-E-7](#)     TIMOTHY/TRACI SHIELDS     MOTION FOR RELIEF FROM  
PD-1             Douglas Jacobs     AUTOMATIC STAY  
12-27-13 [[106](#)]  
WELLS FARGO BANK, N.A. VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 27, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here the moving party reused a Docket Control Number. This is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

**Final Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief from the Automatic Stay is granted.** No appearance required.

Wells Fargo Bank, N.A. seeks relief from the automatic stay with respect to the real property commonly known as 2778 El Noble Avenue, Oroville, California. The moving party has provided the Declaration of Edwina Christian to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

**Relief Based on 11 U.S.C. § 362(d)(1)**

The Christian Declaration states that the Debtor has not made 7 post-petition payments, with a total of \$6,255.90 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$123,736.27 secured by movant's first trust deed, as stated in the Christian Declaration, while the value of the property is determined to be \$80,000, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

#### **Relief Based on 11 U.S.C. § 362(d)(2)**

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Wells Fargo Bank, N.A., and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

The moving party's request for attorney fees is denied, as the Motion fails to state with particularity the grounds for relief, including the provisions of the deed of trust and any other contractual provisions from which relief can be granted. See Fed. R. Bankr. P. 9013. The court cannot determine what "non-bankruptcy law" is being asserted as the basis for attorney fees. Though the points and authorities makes reference to the deed of trust, the movant was unable to direct the court to any specific provision. Further, no information is given as to the amount of legal fees requested, the legal fees counsel is actually being paid for the motion, or how the court could determine if the fees were reasonable. As such, the request for attorney fees is denied. FN.1

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FN.1. Notwithstanding denying the request for attorneys' fees in this contested matter, this creditor and counsel have presented a plausible basis for the court awarding reasonable attorneys' fees in connection with a

motion for relief which a creditor could include as part of its bid or payoff demand in connection with a non-judicial foreclosure. While not part of the secured claim to be paid through bankruptcy, 11 U.S.C. § 506(b), and not knowing whether there is an unsecured claim, California Code of Civil Procedure §§ 580b and 580d anti-deficiency issues, such may well not be an impediment to the awarding of reasonable attorneys fees, actually incurred and paid or to be paid, for the legal services rendered.

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No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 2778 El Noble Avenue, Oroville, California.

No other or additional relief is granted.

2. [13-29351](#)-E-7 SHELBY SCANLAN  
DBJ-1 Nikki Farris

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
1-10-14 [[55](#)]

DOUGLAS SHIELDS VS.

Local Rule 9014-1(f) (2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, Chapter 13 Trustee, and Office of the United States Trustee on January 10, 2014. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to continue the hearing on the Motion for Relief from the Automatic Stay to 1:30 p.m. on February 11, 2014.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Douglas T. Shields seeks relief from the automatic stay with respect to the real property commonly known as 1480 Oak Ridge Drive, Chico, California. The moving party has provided the Declaration of Douglas Shields to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Shields Declaration states that the Debtor has not made one post-petition payments, with a total of 807.81 in post-petition payments past due. The Motion asserts that relief from the stay should be granted pursuant to 11 U.S.C. § 362(d) (2) [based on no equity and not necessary for an effective reorganization], stating with particularity (Fed. R. Bank. P. 9013) the following grounds:

- A. Debtor is obligated to Movant under a promissory Note which is secured by the 1480 Oak Ridge Dr. Property.
- B. The obligation now owed on the Note is \$105,926.49.

- C. The Debtor defaulted in payments on the Note in December 2011 and has continued to default in each subsequent month though the date of the Motion.
- D. Movant is entitled to relief from the stay pursuant to 11 U.S.C. § 362(d) (2).

Motion, Dckt. 55.

Douglas Shields, the Movant, provides his testimony in support of the Motion. Declaration, Dckt. 57. In the declaration he provides testimony to authenticate the Note and Deed of Trust, provide information about the defaults, and to state the amount owing on the Note. No testimony is provided as to the value of the Property or to any other facts or circumstances concerning his status as a creditor or the impact of the non-payment of this obligation by the Debtor.

On its face, the Motion fails to allege a critical element for relief pursuant to 11 U.S.C. § 362(d) (2) - that there is no equity in the property for the Debtor or the estate. 11 U.S.C. § 362(d) (1) (A). Movant carries the burden of proof on this issue. 11 U.S.C. § 362(g) (1).

#### **DISCUSSION**

The Debtor commenced this bankruptcy case on July 15, 2013 as a Chapter 13 case in which Debtor sought to restructure her finances. The case was converted to one under Chapter 7 on December 3, 2013. Election to Convert by Debtor, Dckt. 42.

On January 13, 2014, the Chapter 7 Trustee issued her Report of No Distribution in this case and the Notice of Report of No Distribution was issued by the Clerk and served on January 14, 2014. Dckts. 61, 62. Implicit in this Report is a determination by the Trustee that there is no "equity" in the Property for the bankruptcy estate, so long as the Property is listed on the Schedules.

Debtor did list the 1480 Oak Ridge Dr. Property on Schedule A filed in this case. Dckt. 1 at 9. Schedule A lists the value to be \$216,000.00 and the claims secured by the Property to be (\$354,844.12). On Schedule C the Debtor does not claim any exemption in the 1480 Oak Ridge Dr. Property. *Id.* at 20.

On Schedule D the Debtor lists 3 different creditors having claims secured by the Property. *Id.* at 22. Schedule D does not indicate the priority of the three liens.

The court accepts the Trustee's Report of No Distribution as a statement that the Trustee does not oppose the relief requested in this Motion. While failing to allege an essential element for the relief, the Trustee has filled in that gap for Movant. The court grants relief from the automatic stay as to the estate.

However, the court will not stretch the pleadings to grant relief from the stay as to the Debtor, no such statement indicating concurrence with the grounds for relief under 11 U.S.C. § 362(d)(2).

Because this case has been converted from Chapter 13 to Chapter 7, the Debtor has received an extended period of time before objections to discharge may be filed and then a discharge entered. Entry of the discharge terminates the automatic stay as it applies to the Debtor and property of the Debtor (which is not then property of the estate). 11 U.S.C. § 362(c)(1). Upon the entry of the discharge the automatic stay is replaced by the discharge injunction. 11 U.S.C. § 524(a).

No discharge can be entered in this case until after the March 13, 2014 deadline for filing objections to discharge expires. That will be eight months after the filing of this case. The deadline in a Chapter 7 case normally expires 90 days after the filing of the case.

From the allegations and testimony concerning non-payment, merely denying without prejudice the motion as to the Debtor would put Movant to the burden of (1) having to wait until after March 13, 2014 and the entry of the discharge injunction to proceed or (2) incurring the cost and expense of filing a new motion. Such does not seem equitable to the court under these circumstances.

Therefore, the court continues the hearing on this Motion to 1:30 p.m. on February 11, 2014 (specially set on the court's Chapter 13 Relief From Stay Calendar). On or before close of business on Friday February 7, 2014, Movant shall file and serve a supplement to the Motion which states all grounds with particularity for relief pursuant to 11 U.S.C. § 362(d)(2) and cite the court to specific evidence filed in support of motion or in the record in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion is continued to 1:30 p.m. on February 11, 2014 specially set on the court's Chapter 13 Relief From Stay Calendar). On or before close of business on Friday February 7, 2014, Movant shall file and serve a supplement to the Motion which states all grounds with particularity for relief pursuant to 11 U.S.C. § 362(d)(2) and cite the court to specific evidence filed in support of motion or in the record in this case.